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Compulsory Drug Treatment in Canada: Historical Origins and Recent Developments

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Key Words

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Abstract

In Canada, illicit drug use and addiction have traditionally been considered as a criminal justice problem and have been addressed from a legal perspective. Over the past century, a medical approach to drug addiction has slowly crept into the criminal justice processing of drug offenders. This has happened through the combination of principles of punishment with principles of addiction treatment in the sentencing of drug offenders to create a distinct application of 'compulsory drug treatment' in Canada. However, this evolution has occurred sporadically over time, with punishment and coercion as predominantly the main approach to dealing with this population. This evolution has recently culminated in Canada with the development of two criminal justice approaches to dealing with the substance use problems of drug offenders that incorporate concepts of punishment and treatment more equally than ever before – conditional sentencing and drug courts. This paper outlines the historical evolution of concepts of 'compulsory treatment', discusses such examples of contemporary 'compulsory treatment' as conditional sentencing and drug courts, and analyses the implications, concerns and challenges associated with these tools currently used in the sentencing of drug offenders in the Canadian context.

Introduction

The use of or addiction to illicit substances – as defined by their criminal status – has traditionally been viewed in Canada as a legal problem and has thus been addressed within the realms of criminal justice. Social or medical interventions for illicit drug use – i.e. treatment interventions in the wider sense – did not proliferate on neutral or unclaimed ground but had to establish their legitimacy within the existing hegemony of 'punishment'. This evolution reflects and has been determined by the particular institutional, ideological and cultural setting in which the phenomenon of 'addiction' and its control has evolved in Canada.

The purpose of this paper is twofold. First, to provide a brief sociolegal history with respect to the role and the evolution of the concept of 'compulsory treatment' in the 20th century. Second, to describe two contemporary Ca-

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nadian 'compulsory treatment' tools, namely conditional sentencing and the drug treatment court. These recent innovations provide an illustration of the distinct Canadian history and understanding of compulsory drug treatment as a combination of punishment and therapy.

Early Drug Control in Canada: Forces of Punishment, Coercion and Treatment

From its very beginnings, the phenomenon of 'illicit drug addiction' in the Canadian context was framed as a criminal justice problem that required punitive control [1, 2]. In its formative stages (1900–1925), both in scope and practice, illicit drug control in Canada focused on psychoactive substances (opium, cocaine, cannabis) that were traditionally non-Western in their cultural usages and which appeared to threaten predominant moral standards [3]. Thus, prohibition in Canada was conceived not primarily as health policy, but rather as a tool of social or class control focusing on ethnic minorities [4, 5]. Framed as a criminal problem, 'addiction' emerged as the property of an evolving, dominant and intricate drug enforcement network [3]. Through the first half of the 20th century, this network promoted the evolution of drug laws that included increasingly aggressive legal tools and punishments for drug offenders, in some instances creating unprecedented encroachments on civil liberties (e.g. a reversal of onus of proof for certain drug offenders) [2, 6, 7].

However, even earlier, isolated initiatives had sought to introduce elements of treatment to the punitive responses aimed at drug misusers through the powers of state control, but these occupied a marginal role [7, 8]. As early as 1927, the federal Deputy Minister of Health proposed the creation of institutions in which drug misusers would be detained for the purposes of treatment. Drug addiction was considered to be linked with insanity, and health authorities believed it necessary to institutionalize drug misusers 'just as long as an insane patient is held' on the basis of provincial mental hospital legislation for the commitment of patients [3].

The novel idea of narcotics prescription programmes – where drug misusers would be provided with narcotics as a last resort when all other treatments had failed – emerged prior to World War II [3, 7, 8]. Again, these propositions largely emerged in conjunction with provisions of compulsion and punishment. Numerous treatment advocates supported the idea of mandatory incarceration of all convicted drug misusers, in order to facilitate treatment.

In the early 1950s, a number of professional or political committees considered proposals for addiction treatment. In 1952, the newly established 'Committee on the Prevention of Narcotic Addiction' recommended the establishment of legislation that would allow the provinces to use civil commitment procedures for the 'arrest and detention and compulsory treatment of habitual users' [3]. The strong drug enforcement representation on these committees supported the idea of compulsory treatment, in that such measures reinforced the overall approach of the 'criminal addict' and countered the pending threat of an increasing medicalization of the addiction phenomenon and its institutional control [3].

Testimony before the subsequent 1955 Special Senate Committee on narcotics addiction was generally characterized by advocates for either narcotics maintenance programmes or 'long-term incarceration or quarantine as a means of eliminating demand' [3, 7]. Many witnesses argued that even if treatment of drug misusers – for example, through narcotics maintenance – was the primary intention, coercion was a necessary prerequisite to successfully alter behaviour [7], the lack of which was also cited as the main reason for the failure of the experimental American drug farms. In the end, the Special Senate Committee recommended the 'compulsory segregation ... of all addicts for long periods of time for the purpose of treatment' [3] but could not initiate such legislation since treatment fell under the provincial jurisdiction of health care.

While initially supporting the progressive idea of narcotics clinics – as well as the suspension of criminal sentences for treatment for convicted drug misusers – a new justice minister in 1958 proposed to 'provide for custody for treatment' of narcotics misusers [3]. Under the proposed provisions, convicted drug misusers would be 'liable to detention and treatment for an indefinite period' in special segregated treatment units to be set up and could be returned to the institution in case of relapse [3].

This indefinite detention for treatment in a special institution was introduced by the government as Part II of the new Narcotic Control Act (NCA) in 1961. This clause reflected the formal synthesis of the ideas of punishment, coercion and treatment in Canadian drug law [2, 7]. The law reinforced the previous prohibitionist approach to drug control and Part II passed through the parliamentary committee hearings without any discussion. Ironically, however, after the many years of discussion and pressure, Part II of the NCA, the compulsory treatment clause, was never proclaimed and thus never became law [2, 7].

With the demise of the 'compulsory treatment' clause of the NCA, the forces merging the realms of punishment and treatment receded and these realms evolved separately. Drug enforcement against drug users expanded substantially between 1960 and 1975, with numbers of arrests rising from a few hundred into the thousands [7, 9]. On the treatment side, the establishment of methadone maintenance in the early 1960s made the idea of medical narcotics prescription a reality and expanded substantially in use and popularity through to the early 1970s [8, 10].

However, methadone treatment was severely challenged from the drug control and medical sectors in the early 1970s and subsequently became stringently regulated and curtailed [8]. Several provincial jurisdictions initiated the drafting of legal frameworks for compulsory addiction treatment [11]. British Columbia tabled its Heroin Treatment Act in 1978, to allow authorities to impose up to 3 years of compulsory treatment on drug misusers [12, 13]. However, the bill met with considerable medical, legal and social resistance, as well as opposition from the federal government, and was declared unconstitutional by the British Columbia Court of Appeal in 1979 [12, 13].

Beginning in the 1980s, increased attention has been paid to the social harms and costs of illicit drug use [14–16]. After numerous years of drafting and debate, a new Canadian drug law – the Controlled Drug and Substances Act (CDSA) – was proclaimed in 1997 [2, 9]. It retained the traditional punitive prohibition focus on drug users, allowing for fines and prison sentences for drug possession. The CDSA – in the letter of the law – articulates a distinct purpose of sentencing for drug offenders by emphasizing justice principles yet 'encouraging rehabilitation, and treatment in appropriate circumstances, of offenders' in one of the statute's guiding principles [17], although the practical meaning and implications of this remain unclear. The punitive focus on drug users continued in enforcement practice under the CDSA [9]. It was not until the late 1990s that measures which incorporated punishment and treatment appeared; it is to these measures that we now turn.

Conditional Sentencing: Responding to Drug Offenders in Canada

Drug offenders are one of the largest groups in the Canadian system, and their sentencing has traditionally posed a significant challenge. Over the years, responses have ranged from the use of purely rehabilitative sanctions stressing treatment to mandatory minimum sentences of imprisonment.

Drug misuse in the correctional population is widespread. A recent survey found that almost half the federal prison population admitted to having used drugs since their admission to custody [18], and a survey of probation officers suggested that over half the case load of probationers aged 18–25 had serious drug addictions [19]. For this reason, many have questioned the wisdom of incarcerating offenders with drug addictions, if they can be adequately punished and simultaneously treated while remaining in the community. Probation orders are clearly inadequate to the task of punishing and treating the more serious cases. In 1996, a sentencing reform initiative (Bill C-41) created a new sanction which, while permitting mandatory treatment, carries an important potential to respond to offenders with substance misuse problems.

The conditional sentence of imprisonment is a term of custody that is served in the community. Certain criteria must be met before a court can impose a conditional sentence of imprisonment (for example, the offender must not pose a risk to the community, and the offence cannot carry a minimum term of imprisonment). However, the ambit of the sanction is very broad and can include sentence lengths up to 2 years less 1 day. Such a high 'ceiling' means that almost all drug offenders are eligible for a conditional sentence, as long as the other criteria are met: the median sentence for drug trafficking in Canada is only 4 months [20]. An offender serving a conditional sentence is subject to a number of conditions, some general and some specific to the individual offender's case. In the event that the conditions are breached without justification, the consequence is committal to custody, usually for the balance of the order.

The conditional sentence was created to reduce the use of incarceration as a sanction and to provide judges with a more powerful alternative disposition than probation [21]. Recently, however, there is growing recognition that the conditional sentence represents a flexible tool with which to respond to special needs offenders, including those with drug dependencies, for whom mandatory treatment may be appropriate. According to the statutory framework of a probation order, a court may order treatment as a condition only with the consent of the offender, thereby limiting its utility to respond to drug offenders who are reluctant to enter a substance misuse programme. With a conditional sentence, however, a judge may unilaterally order the offender to comply with any 'treatment programme approved by the province'. And, since failure

to comply with any condition can expeditiously lead to imprisonment, an offender serving a conditional term of imprisonment in the community has a powerful incentive to remain in treatment and to comply with treatment-related conditions such as abstinence. Thus, judges now have a tougher disposition to consider as an alternative to 'conventional' custody, filling a need for cases that are too serious to be candidates for probation.

The conditional sentence is therefore a way of satisfying justice and simultaneously addressing the conditions giving rise to offending. This represents a major advance over narrow retributive responses to crime, which ignore addictions as being irrelevant to culpability, and treatment, which fails to fulfil a statutory requirement for a proportionately severe response to offending. But conditional sentencing involves a fine balancing of interests; too much attention to treatment will be seen by the community as rewarding offending, while overemphasizing punishment will undermine the therapeutic enterprise.

Use of the Conditional Sentence

In the 5 years since the creation of the new disposition, courts have imposed almost 100,000 conditional sentences, and the frequency of the dispositions has recently increased following a strong endorsement of the sanction by the Supreme Court in a guideline judgment in 2000 ('R. v. Proulx'). Drug offenders have been a primary target for the new sanction. For example, La Prairie reports that in one province (Quebec) almost one conditional sentence in five involved a drug offender [22].

National data with respect to the imposition of conditional sentences are not yet available. However, studies in specific jurisdictions make it clear that judges are using the conditional sentence to target drug offenders. A study covering the first three years of the conditional sentence regime (1996–1999) found that alcohol or drug treatment was the most common condition imposed, in one case in five [23]. A study conducted in Vancouver and its suburbs, the area of the country with the highest prevalence of drug offenders [24], found that fully one third of conditional sentence orders were imposed for convictions under the CDSA.

In addition, the most frequently imposed conditions were all treatment related (i.e. drug counselling; residential treatment/recovery house; comply with rules of a treatment centre). Drug counselling appeared in almost half of all orders imposed; this suggests that treatment is being ordered for offenders convicted of non-drug crimes, who nevertheless have a drug addiction problem. Similar findings emerge from a study of conditional sentencing in Ontario, Canada's largest province. Treatment was imposed as a condition in 45% of conditional sentences [25]. Finally, a national survey of judges found that fully 88% of judges stated that they 'often' imposed drug treatment as a condition of a conditional sentence of imprisonment [26].

The courts have adopted a liberal interpretation of the conditional sentencing provisions, with the result that participating in out-patient drug treatment and residential treatment programmes is a common condition attached to conditional sentences. The use of the conditional sentence in this respect is likely to grow even more frequent as a result of another recent Supreme Court decision ('R. v. Knoblauch'), which emphasized the goal of treatment over punishment in the case of a psychiatrically disabled offender.

A number of questions remain to be answered with respect to the application of the conditional sentence to drug offenders. The effectiveness of the intervention (relative to other sanctions) has yet to be proven, and no conclusive evidence exists on the interaction dynamics of or compatibility between treatment and punishment principles and practices. Also, trial judges may not be in the best position to determine the kinds of offenders for whom compulsory treatment is appropriate, or the kinds of treatment-related conditions that should be imposed. Pre-sentence reports are of some assistance in this regard, but probation officers in Canada already deal with a heavy case load and may not be able to offer the court up-to-date recommendations with respect to treatment options.

Another danger with the use of a conditional sentence for the more serious cases is that courts may be sending an inappropriate message to such offenders, that message being that the judicial response to drug offending is now primarily treatment oriented, with a subordinate element of punishment. Allowing the offender to remain in the community may also permit drug offenders to maintain their criminogenic associations and indeed to continue criminal activities. Federal prosecutors participating in a survey on conditional sentencing have expressed reservations about the use of the new disposition for drug offenders, particularly the more serious cases [La Prairie C., Koegel C., Neville L., unpubl. data, 1998]. Finally, the very success of the new sanction may be its downfall; if the conditional sentence is used for too many offenders, the addiction treatment system – already operating close to capacity and without much prospect for resource increases – may be overloaded quickly.

The second penal innovation to be implemented in Canada using non-custodial sanctions and coerced treatment concerns specialized courts for drug offenders, recently established on a pilot basis.

Contemporary Compulsory Treatment: The Drug Treatment Court

The Drug Treatment Court (DTC) or 'drug court' concept is an example of contemporary compulsory treatment, consisting of therapeutic programming while simultaneously exerting considerable punitive control over drug offenders through the imposition of strict programme requirements. Under the DTC model, non-violent drug offenders are given an alternative to incarceration in the form of a regimented drug treatment programme. The DTC concept is a North American invention. It was first introduced in the late 1980s in the USA as part of a therapeutic jurisprudence movement to address the increased numbers of drug offenders incarcerated under the American 'War on Drugs' [27]. Its main promises are to increase court efficiency, to provide effective treatment for the increasing representation of illicit drug misusers among the correctional population and to achieve cost savings [27].

To date, there are approximately 600 DTCs operating in the US [28]. The proliferation of DTCs in the USA has certainly influenced the implementation of DTCs in Canada, although the Canadian version has been modified to conform to the Canadian legal and drug treatment systems [29].

The Toronto DTC

The Toronto DTC was established in 1998, based on a special pilot initiative between the federal Justice Department, community corrections and the Centre for Addiction and Mental Health, a provincial hospital. Participation occurs upon recommendation from the defence, prosecution and judge, and is restricted to offenders arrested for a drug offence involving either cocaine or opiates. Based on the seriousness of their offence, offenders are referred to different 'tracks' in the programme. Offenders charged with less serious offences (such as narcotics possession) are referred to 'track one' which involves a preplea, not requiring the offender to make a plea before entering the DTC programme. Offenders charged with more serious offences (such as trafficking) are referred to 'track two', which is a post-plea alternative. Track two offenders must plead guilty before entering the programme [30]. The division of offenders into two tracks has implications for the sentencing process upon clients' completion of or termination from the program.

Following admission, the client begins a 9- to 18-month individualized out-patient treatment programme at the Centre for Addiction and Mental Health. This treatment programme consists of a combination of cognitive-behavioural approaches, relapse prevention, training for life skills, psycho-educational sessions, group counselling, case management and pharmacotherapy treatment [30, 31]. DTC clients are required to comply with numerous social or behavioural controls and requirements including: attending treatment; reporting to court twice a week and participating in a daily random urinalysis programme. Clients furthermore have to comply with requirements of their various treatment components, including the abstention from drugs, improvements of their educational, work, financial and housing situation [30].

Clients are subject to a strict rewards and sanctions programme related to their behaviour and performance in the programme. Failure to attend court or treatment sessions, re-offending or persistent use of illicit drugs are generally considered evidence of programme non-compliance [30], although considerable discretion is used by the court, which partly depends on the clients' 'honesty' with respect to these behaviours. The possible sanctions that the DTC judge can impose for programme non-compliance consist of increasing the frequency of court attendances, treatment sessions or urine tests, all the way to removal from the programme. As well, bail revocations, bench warrants or warnings and judicial admonishments may be issued. The possible rewards that may be granted to DTC clients if they comply with all programme requirements include: fewer court appearances; fewer urine tests and/or verbal commendations from the bench [30].

DTC clients graduate from the programme when they have fulfilled certain criteria. These include a record of consistent attendance at court, abstention from illicit drug use and a 'positive lifestyle change' involving employment or volunteer work [30]. Successful 'track one' clients have their charges withdrawn, while successful 'track two' clients have a non-custodial sentence imposed [31]. Clients who drop out or are removed from the DTC programme are returned to regular court proceedings and sentencing [31].

Unlike the American DTCs [32–34], no conclusive outcome evaluation data are available with respect to the Toronto DTC. A quasi-experimental outcome evaluation study was funded by the federal justice department and

put into operation in 1999, yet critics have proposed that its 'limitations will likely make it impossible to draw definitive conclusions about the effectiveness [of the Toronto DTC] once the results are analysed' [35]. The study consists of an 'experimental group' and a 'comparison group' [30], the former being offenders who have been admitted to and begun participation in the DTC programme, the latter comprising offenders who have been deemed eligible for the programme but decided not to participate in it. Each group is followed up after intake for a period of 24 months, and the two groups are compared based on demographics, risk level, recidivism and quality-of-life measures [30].

Preliminary data from a data collection period of April 1999 to July 2001 reveal that out of a total of 318 offenders who were referred to the Toronto DTC programme, 214 (67.3%) offenders make up the experimental group and 49 (15.4%) offenders make up the comparison group [36]. However, only 18.7% of the original experimental group are continuing treatment; 65.4% of the group have been expelled or have withdrawn from treatment, and 11.7% of the group have graduated from the programme. The overall retention rate among the experimental group is about one third at 34.6% (74/214). With ongoing programme participation as an indicator, the above data seem to suggest that the DTC appears to 'work' for a minority of subjects at best, even though subjects in current DTC pilot projects tend to be carefully selected and less problematic offenders [37]. However, preliminary data suggest that the experimental group clients are less likely to re-offend after admission into the DTC programme than the comparison clients (58.2 vs. 79.1%) [36].

A number of fundamental concerns have been raised with regard to the approach, procedure and effects of the DTC model. One problem involves the implications on the sentencing and treatment of offenders associated with fusing therapy and punishment.

The court must somehow impose punishment without undermining offenders' treatment and encourage treatment at the same time without neglecting the legal requirements of punishment. This has represented a substantial challenge to the drug court; however, punishment is usually seen as the predominant normative framework [38, 39]. The fact that many offenders have to plead guilty to their charge in order to enter the drug treatment court may represent a threat to offenders' due process rights [39]. These constitutionally protected rights are often undermined under circumstances of termination of treatment for non-compliance and redirection to the traditional criminal justice process [37, 40]. Furthermore, the high risk of 'failure' in the DTC and the offender's subsequent redirection to the traditional criminal justice process creates a situation whereby the offender may be punished doubly, for his/her offence as well as the 'failure' in what is seen as the supportive opportunity of the diversion programme.

Furthermore, by representing itself as a treatment option, the DTC may have net-widening effects by encouraging the prosecution of drug offenders [39, 41]. The drug treatment court concept has been adopted enthusiastically in North America in the absence of evidence that would show clear superiority in effectiveness or cost-effectiveness compared to other interventions, furthermore often relying on the projection of hypothetical savings and not considering major institutional or system costs [35, 37, 39, 42]. Existing evaluation studies are often methodologically unsound in favour of treatment due to a self-selection bias on experimental subjects retained in treatment over time, not considering the behaviour of treatment drop-outs [43].

Conclusion

From its inception, the phenomenon of illicit drug addiction in Canada has been framed primarily as a criminal problem and has been dominated by law enforcement institutions, ideology and interests. 'Treatment' as an alternative response to addiction has existed throughout the 20th century, but always had to assert itself against the predominance of punishment [3, 7]. These dynamics must be understood within the wider cultural, institutional and ideological framing of law, health and addictions in Canada. Attempts to merge the ideological and institutional interests of punishment and treatment, i.e. by state-sponsored laws or programmes combining coercion and treatment, has been a persistent thread throughout this period of Canadian history [8]. After a period of more separate co-existence, these realms have recently come together in the specific initiatives of conditional sentencing and drug courts.

These developments in Canada are probably explained by a variety of factors. First, persistent frustrations with the seeming ineffectiveness of state responses to the 'drug problem' require new symbolic and seemingly innovative efforts [37, 39]. Second, a recent neoconservative political environment has provided fertile grounds for treatment of 'addiction' as allegedly deviant and harmful behaviour embedded in frameworks of coercion and punishment [9].

Third, both these initiatives were tied to promises and hopes of fiscal cost-effectiveness and savings. These dynamics may explain why the federal Justice Minister has recently declared drug courts a 'success' and announced their expansion across the country long before a comprehensive, federally funded evaluation has produced any conclusive results [35, 37].

Many questions remain with regard to the current tools of compulsory treatment. The main issue, arguably, is that their true effectiveness and cost-effectiveness remains to be proven for the Canadian context. The use of compulsory treatment raises questions with regard to the relationship between the coercive nature of the treatment imposed and client motivation to remain and succeed in treatment [44, 45]. Furthermore, as with diversion programmes with similar objectives for other offender categories, compulsory treatment calls into question the evolving new dynamics and goals of 'justice' and social control, given the implications of these goals on civil rights and liberties [46, 47]. For example, the requirements of a conditional sentence or drug treatment court on an offender may include onerous behavioural and social measures that 'correct' multiple aspects of the offender's life which are irrelevant to the traditional goals of 'punishment'. Furthermore, principles of due process may be seriously undermined by making social, health and behavioural modification the main objective of 'justice' work [48].

To conclude, although compulsory treatment currently plays an important role in state responses to 'addiction', the effectiveness and sociolegal implications of this role remain to be elucidated by future research.

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